PP

v.

SHAHRULNIZAM OTHMAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
SOFIAN ABD RAZAK J
[CRIMINAL REVISION NO: 43-12-2010]
30 AUGUST 2010

CRIMINAL PROCEDURE: *Criminal revision - Decision by magistrate allowing accused to cross-examine deponent - Deposition taken from deponent and order for deportation made under s. 40A Immigration Act 1959/1963 - Whether accused having right to cross-examine deponent - Whether magistrate adopting wrong approach in allowing for such right - Criminal Procedure Code, s. 323*

The learned magistrate allowed counsel for the accused respondents to cross-examine a deponent from whom deposition had been taken and an order for deportation had been made under s. 40A of the Immigration Act 1959/1963. The Public Prosecutor applied for a revision of the learned magistrate's decision on the ground that the learned magistrate was wrong in law to have allowed for the cross-examination of the deponent under s. 40A. Counsel for the respondents argued that there was a *lacuna* in s. 40A as it did not state that the cross-examination was not allowed.

Held (setting aside magistrate's decision):

(1) There was no *lacuna* in s. 40A of the Immigration Act 1959/1963 for the reason that the words therein "Notwithstanding anything contained in this Act and any written law to the contrary ..." explicitly excluded any other written laws in its application, *ie*, the Evidence Act 1950 and the Rules of the High Court 1980. If Parliament had intended that any other provisions in any written law to the contrary applied to s. 40A of the Act, it would have clearly stated so as it did in s. 52(4) of the Anti-Trafficking in Persons Act 2007 where Parliament had intended that in the course of the recording of evidence of the trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950. The

court was not prepared to read words into s. 40A and interpret it the way the respondents had submitted. In the circumstances, the learned magistrate was wrong in her approach to have allowed the respondents' counsel the right to cross-examine the deponent. (paras 22 & 23)

[Proceedings ordered to be held without the right by counsel to cross-examine the deponent.]

Case(s) referred to:
Ment & Ors v. PP [1994] 2 CLJ 408 HC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
Tan Sri Eric Chia v. PP [2006] 2 CLJ 544 CA ***(refd)***

Legislation referred to:
Anti-Trafficking in Persons Act 2007, s. 52(4)
Criminal Procedure Code, s. 323
Evidence Act 1950, ss. 2, 32, 33, 73A, 135, 138(1)
Immigration Act 1959/63, s. 40A
Rules of the High Court 1980, O. 39 r. 8

Other source(s) referred to:
Augustine Paul FCJ, *Evidence Practice and Procedure,* 2nd edn, p 354

For the appellant - DPP; Department of Immigration, Malaysia
For the respondents - Mishant Thiruchelvam; M/s Mishant & Co
En Rubachandran; M/s Miranda & Samuel
Azni Iffa; M/s Norhairi & Azli

[Editor's note: The Anti-Trafficking in Persons Act 2007 is now cited as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.]

Reported by Usha Thiagarajah

JUDGMENT

Sofian Abd Razak J:

[1] The Public Prosecutor had written a letter dated 28 June 2010 to the Deputy Registrar of the High Court Criminal Division of the High Court pursuant to s. 323 of the Criminal Procedure Code for the hearing of an application for revision by me of the learned Magistrate's decision made on 25 May 2010. The learned Magistrate's decision was to allow the counsel for the accused persons the right to cross-examine the deponents whose depositions were being taken under s. 40A of the Immigration Act 1959/63.

[2] It is pertinent at this juncture to reproduce the portions relevant to this judgment, of all five (5) sections of Chapter XXX1 of the Criminal Procedure Code:

Section 323 Power to call for records of subordinate Courts

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that Subordinate Court.

Section 324 Power to order further inquiry

(1) On examining any record under section 323 or otherwise, a Judge may direct the Magistrate to make, and the Magistrate shall make, further inquiry into any complaint which has been dismissed under section 135, or into the case of any accused person who has been discharged.

Section 325 Powers of Judge on revision

(1) A Judge may, in any case where the record of proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorize a Judge to convert a finding of acquittal into one of conviction.

Section 326 Permission for parties to appear

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision:

Provided that the Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection 325(2).

A Section 327 Orders on revision

When a case is revised under this Chapter by a Judge he shall certify his decision or order to the Court by which the finding, sentence or order revised was recorded or passed stating, where the finding, sentence or order has been varied, the grounds for such variation; and the Court to which the decision or order is so certified shall then make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith.

C **[3]** On 6 July 2010, I called for the records of proceeding for the purpose of satisfying myself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the Magistrate's Court.

The Applicant's Submission

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[4] The learned deputy public prosecutor, En Anselm Fernandis in his submission before the court was of the view that the learned Magistrate had taken the wrong approach when recording the deposition of witnesses under s. 40A of the Immigration Act E 1959/63 by allowing the defence counsel to cross examine the deponents whose deposition had been taken.

[5] Section 40A of the Immigration Act 1959/63 reads as follows:

F 40A. Admissibility of deposition of person who cannot be found

(1) Notwithstanding anything contained in this Act and any written law to be the contrary, where in any proceeding for any offence under this Act a testimony of any person in respect of whom an order for removal from Malaysia has G been made by the Director General under sections 32, 33 and 56(2) is required by the Court any deposition relating to the subject matter of that proceeding made by that person:

H (a) in Malaysia before a Sessions Court Judge or a Magistrate in the presence or absence of the person charged with the offence; or

(b) outside Malaysia before a consular officer or a judicial officer of a foreign country in the presence or absence I of the person charged with the offence, and any such deposition shall without further proof, be admitted as *prima facie* evidence of any fact stated in the deposition.

(2) It shall not be necessary for any party in any proceeding to prove the signature or official character of the Sessions Court Judge, Magistrate, consular officer or judicial officer before whom the deposition under subsection (1) was made.

(3) For the purposes of this section, reference to:

(a) a "deposition" includes any written statement made upon oath; and

(b) an "oath" includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swear.

(4) Nothing in this section shall prejudice the admission as evidence of any other depositions.

[6] The learned deputy public prosecutor further submitted that nothing in s. 40A of the Act allows the cross-examination of the deponent by the accused or its counsel. Cross-examination is only permissible in s. 135 of the Evidence Act but it can only be done when a witness gives evidence on oath. However it does not extend to an affidavit.

[7] The learned deputy public prosecutor then drew the court's attention to s. 52(4) of the Anti-Trafficking in Persons Act 2007 where Parliament had intended that in the course of the recording of evidence of the trafficked person, he shall be examined in accordance with the provisions of Evidence Act 1950. Further it was submitted that there was no *lacuna* in the law which requires the court to interpret.

The Respondents' Submission

[8] The learned counsel for the respondents Encik Mishant Thiruchelvam submitted that s. 40A of the Act clearly states 'Admissibility of deposition of person who cannot be found'. The exclusionary words referred to in that section which reads as follows: "Notwithstanding anything contained in this Act and any written law to the contrary ..." does not preclude the application of the entire Evidence Act 1950 to the said section for the simple reason that what was excluded in s. 40A is the provisions of ss. 32 and 73A of the Evidence Act 1950 which deal with the admissibility of first and second hand hearsay evidence. Section 40A is a provision that deals with admissibility of hearsay

statements. Therefore, it should be interpreted as such and not as suggested by the learned Deputy Public Prosecutor which is to exclude entirely the application of the Evidence Act 1950 to a s. 40A deposition. It could never be the intention of Parliament from reading s. 40A to exclude in its entirety all rules of evidence as found in the Evidence Act 1950 in criminal proceeding.

[9] It was further submitted by the learned counsel that s. 40A does not state the manner in which such depositions should be taken. As such there is a *lacuna* in s. 40A and is plugged by s. 33 of the Evidence Act 1950 which permits the admissibility of statements made in the course of previous judicial proceedings.

[10] In the course of his submission, the learned counsel for respondents made reference to the relevant provision of ss. 2, 138(1) and 33 of the Evidence Act 1950 and O. 39 r. 8 of Rules of the High Court 1980 which is reproduced herein for easier reference.

> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceeding before an arbitrator.
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> **138(1) Order of examinations and directions of re-examination**
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> (1) Witnesses shall be first examined in chief then if the adverse party so desires, cross-examined then, if the party calling them so desires, re-examined
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> **33. Relevancy of certain evidence for providing in subsequent proceeding the truth of facts therein stated**
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> Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of facts which it states, when the witness is dead or cannot be found or is in capable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable:
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> Provided that:
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> (a) the proceeding was between the same parties or their representatives in interest;

(b) the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) the questions in issue were substantially the same in the first and the second proceeding. (emphasis added).

[11] It was the contention of the learned counsel that since s. 40A is silent on the manner of taking of depositions then ss. 33 and 138(1) of the Evidence Act 1950 ought to apply with regard to the manner in taking such depositions.

[12] In O. 39 r. 8 of the Rules of the High Court 1980 which deals with the conduct of taking depositions in civil cases which is as follows:

Conduct of examination (Order 39 rule 8)

(1) Subject to any directions contained in the order for examination:

(a) any person ordered to be examined before examiner may be cross-examined and re-examined; and

(b) the examination, cross-examination and re-examination of persons before the examiner shall be conducted in like manner as at the trial of a cause or matter.

(2) The examiner may put any question to any person examined before him as to the meaning of any answer made by that person or as to any other matter arising in the cause of the examination.

(3) The examiner may, if necessary, adjourn the examination from time to time.

[13] In order to further fortify its argument, learned counsel for the respondents referred to a book written by the late Augustine Paul FCJ entitled "*Evidence Practice and Procedure* 2nd edn at p. 354" and is reproduced herein under the subheading "Principle and Scope" and states as follows:

The general rule is that a witness must give his evidence under oath or affirmation and subject himself to cross-examination. But this may not be always possible. Thus this section provides that evidence given by a witness in a judicial proceeding may be used in a subsequent judicial proceeding subject to certain conditions being fulfilled.

[14] The condition to be fulfilled is that before a deposition can be used is that the adverse party must be given the opportunity for cross-examination of the witness at the previous proceeding.

[15] In the instant case the deponents are still in the country and available to give evidence at the trial. However s. 40A allows for deposition to be taken where an order for removal from Malaysia has been made by the Director General against the deponent and the said deposition shall be *prima facie* evidence of any fact stated in the deposition. Therefore the learned counsel for the respondents further argued that in the circumstances it would only be fair that the right to cross-examine the deponent at the taking of the deposition be allowed since the accused has the undoubted right to cross-examine the same deponent if they were produced at the proper trial. There must be procedural fairness in taking of the deposition since the deposition once recorded cannot subsequently impeached or challenged at the trial proper. Furthermore, as the deposition stands as *prima facie* evidence of the truth of the contents or matters stated therein, the weight to be attached to such a deposition by the presiding Magistrate or Sessions Judge at the trial proper would be considerable. The defence would be handicapped at the trial if it is not allowed the opportunity to cross-examine the witnesses at the stage of the recording of the deposition. A restrictive interpretation of s. 40A would render the Constitutional guarantees of the due process and equality under the law illusory and effective as the prosecution would be given an unfair advantage over the defence once a deposition is tendered into evidence at the trial proper and it will seriously undermine and imperil the presumption of innocence which is the golden thread that runs through the system of criminal justice.

[16] The learned counsel for the respondents disagreed with the view of the learned deputy public prosecutor that there is nothing in s. 40A to suggest that the right to cross-examine the deponent giving the deposition has been excluded. On the contrary the section provides that the deposition can be taken in the presence or absence of the accused which must also include his legal representatives (if any). It was further argued that if it was the intention of Parliament was to exclude the right to cross-examine deponent during the taking of deposition, then the Legislature would not have made provisions for the presence of the accused

(and his legal representatives) at the taking of the deposition. Such a narrow and restrictive interpretation as suggested by the learned deputy public prosecutor and/or his legal representatives superfluous. It must be remembered that there is a legal maxim that Parliament must have only intended to do what is right.

[17] The learned counsel for the respondents in the instant case has accused the prosecution of taking an easier way out by taking the depositions instead of proving their case in the trial proper by calling oral evidence from the relevant witnesses. The fact that the prosecution in this case had pre-prepared the depositions for the deponent to affirm only goes to show that s. 40A is being misused by the prosecution for its own purposes to secure a conviction at any rate at the expense of the interest of justice. Recourse to s. 40A depositions should be the exception and not the norm in immigration cases. It should be sparingly used as the said section deprives the accused of a fair trial given that the deposition once recorded and tendered cannot be challenged by the defence. The defence is not challenging the right of the prosecution to rely on s. 40A depositions as *prima facie* evidence of the truth of the contents therein. The defence is only taking issue with the manner in which the deposition is taken. This is a fundamental and intrinsic legal right that must be read into s. 40A to prevent any abuse of process.

[18] The learned counsel then referred to the case of *Tan Sri Eric Chia v. PP* [2006] 2 CLJ 544 where it was held that even though the Mutual Assistance in Criminal Matters Act 2002 was silent on the manner of taking of depositions, nevertheless the counsel for the accused was allowed to cross-examine the witnesses giving the deposition after the Attorney-General had finished with his examination in chief of the witnesses. The depositions were taken abroad.

The Finding Of The Court

[19] The court has been asked by the prosecution to exercise its revisionary power under s. 323 of the Criminal Procedure Code to examine the correctness, legality or propriety of the finding, sentence or order recorded or passed and as to the regularity of the proceedings of Magistrate's Court on 21 April 2010. The order made by the learned Magistrate was to allow the learned

counsel for the respondents to cross-examine a deponent from whom deposition had been taken and where an order for deportation had been made by the Director-General of Immigration pursuant to s. 40A of the Act. The learned deputy public prosecutor submitted that the learned Magistrate was wrong in law to have allowed the cross-examination of a deponent by the learned counsel for the respondents from whom deposition was recorded. The learned counsel for the respondents said there is a *lacuna* in s. 40A as it is silent on whether cross-examination of a deponent in a deposition is disallowed. The fact that the section is silent on this issue could be interpreted to mean that it allows for cross-examination of a deponent in a deposition.

[20] On the duty of the court as to yield to the intention of Parliament there is a welter of authorities on the principles of law governing the construction of statutes which Vincent Ng JC (as he then was) in *Ment & Ors v. PP* [1994] 2 CLJ 408 at pp. 409-410 said as follows:

> (a) Words in an Act of Parliament are to bear the natural and grammatical construction, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification. Thus justifying the court in putting on them some signification which, though less proper, is one, which the court thinks the words will bear;
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> (b) Judges are to construe Acts and not to legislate, and the legislature is to provide a remedy when one is wanted;
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> (c) The court has no authority to limit a statute or to put upon the words of a statute a limitation which is not in according to the ordinary meaning of the words;
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> (d) A statute should not be read to give it an effect such that it is a pointless piece of legislature;
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> (e) All that the court has to do is to consider the plain meaning of the statute;
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> (f) Where the meaning of the words in the statute is plain and unambiguous judges should not invent such fancy ambiguities;

(g) The court must give effect to the clear and explicit language of the enacting words. It cannot disregard them unless it is apparent that some other meaning is intended. It must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context;

(h) The first task of the court is to find out the intention of Parliament and the words of a statute speak the intention of the legislature. And in so doing, it must bear in mind that its function is *jus dicere*, not *jus dare*: the words of a statute must not be overruled by judges, but reform of the law must be left in the hands of Parliament.

[21] I am however guided by a passage by Steve Shim CJ (Sabah and Sarawak) (as he then was) in *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713 and can do no better than to quote *in extenso inter alia* said:

... The court then cited with approval the observation by Lord Simonds in *Magor & St. Mellows Rural Council v. Newport Corporation* [1952] AC 189 HL wherein he said that the duty of the court was to interpret the words of a statute that the legislature had used. It is of course trite law that if the intention of the legislature is expressed in words which are clear and explicit, the court must give expression to that intention. As *Bindra's Interpretation of Statutes*, 8th end has stated:

> If the intention of the Legislature can be ascertained all rules of construction must yield to the Legislative intention (*Board of Trustees v. Johan Steele* [1933] SCC (SC) 47). They cannot override the legislative intent specially expressed in the enactment (*State of Up v. Jaipal Singh Narsh* [1978] All L1 936). If the intention of the Legislature is clear, that intention constitutes the law.

The primary duty of the court is to give effect to the intention of the legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words have not acquired any technical meaning, they should be deemed to have been used in the ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone in such case best declare the intent of the law giver.

[22] Upon the reading of s. 40A of the Act, the court was of the view that there is no *lacuna* in the section as it is quite clear that the words "Notwithstanding anything contained in this Act and any written law to the contrary" explicitly excludes any other written laws that is the Evidence Act 1950 and the Rules of High Court 1980 in the application of s. 40A. If Parliament had intended that any other provisions in any other written law to the contrary applies to s. 40A of the Act, then it would have clearly stated so as it did in s. 52(4) of the Anti Trafficking in Persons Act 2007 where Parliament had intended that in the course of the recording of evidence of the trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950. I am not prepared to read words into s. 40A and interpret it the way learned counsel for the respondents had submitted.

[23] For the reasons as adumbrated above, I therefore exercised my revisionary power under s. 323 of the Criminal Procedure Code and ruled that the learned Magistrate was wrong in adopting the approach which she had adopted in allowing the learned counsel for the respondents the right to cross-examine the deponent. The upshot is that the decision of the learned Magistrate made on 25 May 2010 is set aside and further order that the proceeding be held without the right by counsel to cross-examine the deponent.